Filed 12/02/04 P. v. Sanches CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SHANE RYAN SANCHES, Defendant and Appellant.	G032738 (Super. Ct. No. 01SF0323) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William Lee Evans, Judge. Affirmed.

Gregory Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil P. Gonzalez and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Shane Ryan Sanches of committing corporal injury upon his spouse, attempted false imprisonment by violence, spousal rape, and resisting arrest. The court found true the prior convictions allegations and, after striking all but one of the priors, sentenced defendant to a total term of 55 years to life. On appeal, defendant limits his contentions to his conviction for spousal rape. (Pen. Code, § 262, subd. (a); all further references are to the Penal Code, unless otherwise noted.)

Defendant first argues there was insufficient evidence to show he had sexual intercourse with his wife without her consent even though the court instructed the jury on belief as to consent (CALJIC No. 10.65). His second contention is that the court erred by instructing the jury with CALJIC No. 3.30 (concurrence of act and general criminal intent). Defendant next argues the law on spousal rape is unconstitutionally vague as applied to his conduct. And lastly, he contends the court did not adequately address the prejudicial effect of the prior sexual offenses admitted under Evidence Code section 1108. We disagree with each of these contentions and affirm the judgment.

FACTS

At the time of the present offense, defendant and his wife (Wife) had been married for almost 14 years. In September 2000, defendant was arrested for an offense unrelated to this case. While in jail, he inherited some money. Wife was able to post bond for him from the inheritance proceeds, and defendant returned home for about a month until he was taken into custody again. During the time defendant was released on bond, Wife told him she was thinking about divorcing him, but had not yet made up her mind. Defendant told her he did not want a divorce.

On May 24, 2001, defendant secured his release from jail and came home. By then, Wife had changed the locks, so he entered the house through a window. Wife had refused to bail defendant out and was surprised to see him. The couple discussed

using their home as collateral for defendant's bail; Wife was against it, but eventually agreed to consider doing it. Defendant spent the night in his car.

The next morning, Wife let defendant into the house; he was still there that evening when she returned home. That night, Wife fell asleep in her daughter's room around 9:00 p.m. and woke up at 11:00 pm. She could hear defendant talking loudly in the bathroom downstairs and discovered that he had been reading her diary. The couple talked for a while, and then defendant followed Wife when she went upstairs to their bedroom.

After they entered the bedroom, defendant shut the door and turned on the stereo; he began to yell at Wife, accusing her of having sex with other men. Wife had been sitting at the foot of the bed, and when she turned to the side, defendant grabbed her from behind. He then shoved her down to the floor to keep her from reaching the phone to call the police. She tried to scream, but defendant put his hand over her mouth and pushed her faced into the floor. He held her arms from behind and attempted to tie her hands together with pieces of duct tape. Wife prevented defendant from tying up her hands by keeping them apart and by scratching his face. Defendant bit the fingers on her right hand, leaving marks still visible the next day. He then tried to scoot her towards the closet as she continued to resist. Wife stopped moving once her back was against the closet door, and she tried to calm herself down to talk to defendant rather than just react.

Defendant was still on top of Wife and when she asked him to let her stand up, he said, "No, I can't do that, you'll call the police." Defendant then told her to take off her pants; when she said she could not reach them, he released her slightly and told her again to take them off. She still could not reach them, so he released her a little more. Wife was afraid defendant would do something to her or hurt their children because he had been violent with her once in the past. At some point, he released her enough so that she could unzip her pants and pull them down to her hips; defendant removed them the

rest of the way. He had pulled off her sweater earlier, so Wife was clad only in her bra and panties.

By this point, the couple had struggled for about an hour; Wife was laying on her back with defendant straddling her midsection. He did not try to have sex with her at that time, but asked what she wanted, which Wife interpreted to mean in terms of their future together. She began to talk about having a family, a house, spending their lives together. They talked for an hour. Defendant told her he did not believe her. He also expressed a belief that she would call the police if he let her up. They talked some more about their future and whether Wife planned to go through with divorcing defendant. She tried to convince him that she would not. During their conversation, defendant French kissed Wife. She kissed him back because she felt she had to go along with him to stay safe.

Around 3:00 a.m., defendant let Wife up to get a drink of water. He followed her into the bathroom and helped clean blood from her elbow. Wife "was shaking and scared." Defendant shaved because she told him his face scratched her earlier. While he shaved, she prepared for bed. Once they were in bed, defendant asked Wife what she wanted, and she "asked him just to hold" her. He held her for a few seconds and then tried to remove her bra. Afraid he would become violent again, Wife helped him remove it. Defendant next took off her panties and began rubbing her vagina. When he commented that she was not wet, she told him she was close to her period.

Their son woke up crying, so defendant got him from his room and brought him to their bed until the child fell asleep again. Defendant then put their son back in his room. Wife was too afraid to try to call the police while defendant was out of the room. When defendant came back to bed, he began to kiss Wife again and rub her vagina. They had intercourse. Wife did not want to have intercourse, but she did not tell defendant to stop. And when defendant asked if she was okay, she said, "Yes," because she did not want him to think anything was wrong. She was both "scared and exhausted," and she

felt pain all over. Afterward she went to the bathroom, brushed her teeth, and checked on the children.

Wife waited until defendant left the house later that morning to call the police. Deputy Mendoza found clumps of Wife's hair on the bedroom floor and some wadded up duct tape in the trash can. He also saw a small blood stain on the carpet. Wife was crying and "appeared to be shook[] up, nervous, [and] afraid."

When the police pulled up behind defendant's car, he opened the door and reached underneath his seat before getting out. The officers drew their weapons, and defendant walked towards them holding his hand by his leg, telling the officers to kill him or shoot him. Once the officers realized defendant did not have a gun they holstered their weapons. Defendant ran, but they quickly caught him. While en route to jail, and after being advised he was being charged with spousal battery, defendant apologized for his actions and said he could not be held responsible because he was bipolar.

At trial, the prosecution offered evidence of two prior incidents where defendant had raped women he had known briefly. Defendant had pleaded guilty to both offenses, which took place in 1986. The defense attempted to show defendant reasonably believed Wife consented to having sexual intercourse with him that night. The defense further tried to show she only accused him of rape because she wanted to divorce him and mistakenly believed she would be able to keep the money he had recently inherited.

DISCUSSION

Sufficiency of the Evidence to Support the Spousal Rape Conviction

Defendant contends there was insufficient evidence to support his conviction for spousal rape because the undisputed evidence showed his wife acted as though she was consenting to sexual intercourse and "no reasonable husband could *not* have had a good faith belief that his wife — who *said* she was consenting and gave every

physical indication that she was consenting — was indeed acting consensually . . . ." He primarily bases his argument on "the crucial calming period . . . between the fight and the act of sexual intercourse."

"In assessing a sufficiency-of-evidence argument on appeal, we review the entire record in the light most favorable to the prevailing party to determine whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Wader* (1993) 5 Cal.4th 610, 640.) We apply the same standard to convictions based largely on circumstantial evidence. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745.) And it is not within our province to reweigh the evidence or redetermine issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Spousal rape occurs when the perpetrator and victim are married to each other and "[w]here [sexual intercourse] is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 262, subd. (a)(1).) Rape, in general, "involves intercourse that is nonconsensual either because consent is not given, is coerced, or is unavailing for one of the reasons specified [by statute]." (*People v. Hernandez* (1988) 47 Cal.3d 315, 344, fn. omitted.) Consent is a defense to rape whereby the defendant contends "he had a good faith, reasonable belief that the victim voluntarily consented to engage in sexual intercourse. [Citations.]" (*Ibid*.) But by the same token, "[c]onsent induced by fear is no consent at all." (*People v. Hinton* (1959) 166 Cal.App.2d 743, 749.)

In assessing the viability of such a defense, the trier of fact "view[s] the events from the defendant's perspective to determine whether the manner in which the victim expressed lack of consent was so equivocal as to cause the accused to assume that there was consent where in fact there was none. [Citation.]" (*People v. Burnett* (1992) 9 Cal.App.4th 685, 690; *People v. Bruce* (1989) 208 Cal.App.3d 1099, 1104.) To this end, the jury was instructed pursuant to CALJIC No. 10.65 that "a reasonable and good

faith belief that there was voluntary consent is a defense to [a charge of rape]," but "a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another is not a reasonable good faith belief."

Here, substantial evidence existed from which the jury could reasonably infer Wife did not voluntarily consent to having sexual intercourse with defendant based on his forceful and violent conduct a few hours earlier. Wife testified she cooperated out of fear for herself and her children's safety. The undisputed evidence showed that, between midnight and 1:00 a.m., defendant forcibly restrained Wife, pushed her onto the floor, and prevented her from reaching the phone to call the police. He tried to tie her hands together with duct tape and left visible marks on her chest, elbow, knee, and fingers. Afraid she would call the police, defendant continued to restrain Wife for another two hours while they talked and kissed. Wife testified that she kissed defendant back to stay safe. She likewise did not resist having sexual intercourse with him later on because she did not want him to think that anything was wrong. Evidence subsequently recovered from the scene included clumps of her hair on the bedroom floor, a wad of duct tape in the trash can, and a small blood stain on the carpet.

While defendant may have believed Wife consented to having sexual intercourse, it was up to the jury to determine whether Wife's compliance "was induced either by force, fear, or both, and . . . fell short of a consensual act. [Citation.]" (*People v. Barnes* (1986) 42 Cal.3d 284, 305.) "That [defendant] may have deluded himself into believing her eventual submission represented a consensual act could have been rejected by a rational trier of fact as an unreasonable response to [her] conduct." (*Ibid.*) Under the totality of the circumstances here, the jury could reasonably infer Wife's "consent" was not voluntary and that defendant's belief to the contrary was unreasonable. Thus, his conviction for spousal rape is supported by substantial evidence.

CALJIC No. 3.30

The court instructed the jury on concurrence of act and general criminal intent (CALJIC No. 3.30) as follows: "In the crime charged in counts 1, 2, 3, and 4, corporal injury to a spouse, attempted false imprisonment, spousal rape, and resisting a peace officer, and the crimes of misdemeanor spousal battery, battery, and simple assault, which are lesser crimes, there must exist a union and joint operation of act or conduct and general criminal intent. [¶] General intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know his act or conduct is unlawful."

Defendant argues that this instruction, as it applied to the charge of spousal rape, was wrong because it "omitted the element of intent to have sex by force . . . ." (Italics omitted.) In so arguing, defendant neglects to address the actual instruction given on spousal rape (CALJIC No. 10.00). That instruction informed the jury of the elements required to find defendant guilty of spousal rape, including that the act of sexual intercourse had to be against the victim's will, meaning "without the consent of the alleged victim," and that the act had to be "accomplished . . . by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . ." Defendant focuses on the term "force" but fails to acknowledge that rape may be accomplished by other means, i.e., fear. The evidence here showed that Wife did not consent to sexual intercourse but acquiesced out of fear for her safety and that of her children. Her fear was induced by the violent acts committed against her earlier that night.

"General criminal intent . . . requires no further mental state beyond willing commission of the act proscribed by law." (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215.) Rape is a general intent crime. (*People v. Burnham* (1986) 176 Cal.App.3d 1134, 1140). As such, it requires only the defendant's criminal intent to commit sexual intercourse without the partner's consent. (*Ibid*.) Looking at the instructions given as a

whole, the jury was properly instructed to consider the issue of consent or absence thereof, and no error occurred.

Constitutionality of the Spousal Rape Statute

Characterizing the incident as "a fairly routine domestic dispute between husband and wife, after which they 'kissed and made up,'" defendant contends the spousal rape statute (§ 262), as applied to him, is unconstitutionally vague. Not so.

Under the void-for-vagueness doctrine, "an as applied challenge assumes that the statute . . . violated is valid and asserts that the manner of enforcement against a particular individual . . . or the circumstances in which the statute . . . is applied is unconstitutional." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1089.) Defendant contends that "[i]f [he] could be convicted of rape on the facts here, he could have been convicted of rape if he had sex with his wife — with her vocal consent — the next day, or the day after that, or weeks or months later. Any act of sexual intercourse between them at any time could have been charged as a rape, so long as Wife was willing to say after the fact that she consented only because she was afraid of [him]." As to this latter contention, it is not within our province to "'consider the question of constitutionality with reference to hypothetical situations.' [Citation.] If the statute clearly applies to a criminal defendant's conduct, the defendant may not challenge it on grounds of vagueness. [Citations.]" (*Id.* at p. 1095.)

As previously stated, spousal rape requires an act of sexual intercourse "accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . ." (§ 262, subd. (a)(1).) The only time requirement in the statute is that pertaining to the fear of bodily injury, which must be immediate. In the context raised by defendant, time is not an element of the offense, nor should it be. It is an issue for the trier of fact to consider in determining whether the sexual intercourse was consensual or accomplished against the victim's will.

Another issue of fact to be determined is whether a defendant had a reasonable good faith belief his spouse consented. "'There is no formula for the determination of reasonableness.' Yet standards of this kind are not impermissively vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind." (*People v. Daniels* (1969) 71 Cal.2d 1119, 1129.) Sexual intercourse between spouses is among the most common of human experiences. It is axiomatic that juries are well equipped to decide such issues of reasonableness. In short, section 262 was not applied here in an unconstitutional manner.

We further dismiss out of hand defendant's contention that his spousal rape conviction infringed on the right to privacy between a marital couple. This is not a victimless case where the state has charged mutually consenting adults with committing a sexual act prohibited by state law in the privacy of their home. (See, e.g., *Lawrence v. Texas* (2003) 539 U.S. 558 [123 S.Ct. 2472, 156 L.Ed.2d 508] [invalidating statute as applied to adult males who engaged in consensual act of sodomy in privacy of home].)

Admissibility of the Prior Sexual Offenses

Defendant argues the court failed to adequately address or consider the prejudice to him from evidence of the prior sexual offenses. He contends the prior offenses should have been excluded based on remoteness in time and because they were not particularly probative in relation to the present offense. We disagree.

Before a prior act of sexual misconduct may be admitted under Evidence Code section 1108, a trial court must carefully weigh the probative nature of the evidence against the possible undue prejudice under Evidence Code section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-917; *People v. Branch* (2001) 91 Cal.App.4th 274, 282.) The trial court "must consider such factors as [the prior act's] nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to

the charged offense, its likely prejudicial impact on the jurors, . . . and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other [acts], or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*People v. Falsetta, supra,* 21 Cal.4th at p. 917.)

The prosecutor sought to admit a total of three prior sexual offenses. The court excluded a prior attempted rape conviction and admitted two rape offenses committed in 1986 to which defendant had pleaded guilty. In the first case, defendant used force to rape a woman he had taken out on a first date. In the second case, defendant met the victim at a bar. He convinced her to take a ride in his car and stop by his apartment. Once in the apartment, he attacked the woman and raped her repeatedly.

In balancing the probative value of the prior offenses with the prejudice to defendant, the court considered the fact the present offense involved a spouse and a long-time relationship and "the defenses that might be available there under certain circumstances that might not be available when you're dealing with a stranger or relative stranger situation." But overall, the court concluded, the prior offenses were admissible under Evidence Code sections 352 and 1108 and this evidence would not be unduly prejudicial or time consuming. The court further stated its belief "the jurors [would] use this evidence, if they believe it, in the proper way, and that it may have some relevance to their decision on whether there was or was not consent . . . ."

We review the trial court's ruling for abuse of discretion. (*People v. Harris* (1998) 60 Cal.App.4th 727, 736-737.) In most cases, we will uphold the trial court's ruling if "the record demonstrate[s] the trial court understood and fulfilled its responsibilities under Evidence Code section 352. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 214.) "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual *and* which has very little effect on the issues.'" (*People v. Callahan* (1999) 74 Cal.App.4th 356, 371, italics added.)

The record shows the court understood and fulfilled its obligation to balance the probative value of the prior offenses with the prejudicial effect on defendant's case. Though committed 15 years earlier, the prior offenses were not so remote as to be inadmissible. Moreover, it is evidence from the record defendant had not "led a blameless life in the interim." (*People v. Harris, supra,* 60 Cal.App.4th at p. 739.) And while the prior and present offenses were qualitatively different in regard to the nature of defendant's relationship with the victims, all three involved acts of rape preceded by violence. Similarly, evidence of the violence inflicted on the victims in the prior offenses was "no stronger and no more inflammatory than the testimony concerning the charged offenses." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) In sum, the court did not abuse its discretion by admitting the prior sexual offenses.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.